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Issue Date: 11 February 2005

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In the Matter of

YVONNE GIBBS, widow of
THOMAS J. GIBBS, deceased,
Claimant,

Case No.: 2004-LHC-00321

v.

OWCP No.: 06-190825

PREMIER STEVEDORING, INC./
SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC.,
Employer/Insurance Carrier, and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.
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Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"), and the applicable regulations appearing at 20 C.F.R. Parts 701 through 704. The primary issue before me is whether, at the time of the December 18, 2002 fatal accident that gave rise to this action, Claimant Yvonne Gibbs' deceased husband, Thomas J. Gibbs, was acting within the course and scope of his employment with Employer Premier Stevedoring, Inc.[1]

A hearing in this matter, scheduled to be held on June 15, 2004 in St. Augustine, Florida, was cancelled at the request of the parties so that this matter could be tried on a written record, consisting of cross motions for summary decision, because no material facts are in dispute and the compensability of Mr. Gibbs' accident is a question of law. *See* 29 C.F.R. § 18.40, 18.41.

[1] Consistent with the nomenclature adopted by the parties, Employer Premier Stevedoring, Inc. and its Insurance Carrier and Servicing Agent, Sedgwick Claims Management Services, Inc., will be collectively referred to as "Employer/Carrier," and decedent Thomas J. Gibbs will be referred to as "Mr. Gibbs." Claimant Yvonne Gibbs will be referenced as "Claimant" and Premier Stevedoring, Inc. will be referenced as "Premier" or "Employer."

Claimant submitted eleven exhibits ("CX 1" through "CX 11") along with her September 1, 2004 trial brief, and Employer/Carrier submitted three exhibits ("EX 1" through "EX 3") along with their September 16, 2004 trial brief. The decision that follows is based upon consideration of the exhibits submitted and the arguments made by both parties.

STIPULATIONS/ISSUES

There were no formal stipulations; however, the facts are essentially undisputed. The parties agree that the primary issue is whether, under the undisputed facts, Mr. Gibbs was acting within the course and scope of his employment at the time of his death, so as to entitle Claimant to benefits under the Act.

The issues set forth on Claimant's Form LS-18 (dated 8/14/2003) are average weekly wage, compensable injury under the Act, causation, and death benefit entitlement. However, Employer has not disputed Claimant's assertion that the pertinent average weekly wage was $509.40 per week, based upon his earnings for the period from January 1, 2002 through December 18, 2002.[2] (Claimant's Brief at 7). In Claimant's Brief, Claimant asserts that there is a secondary issue of whether she is entitled to a penalty (under section 14 of the Act, 33 U.S.C. §914) due to Premier's failure to timely controvert the claim. (Claimant's Brief at 1 to 2).

PROCEDURAL HISTORY

In a Claim for Death Benefits (Form LS-262) dated February 28, 2003, Claimant alleged that Mr. Gibbs had died on December 18, 2002 at the Smurfit-Stone Dock in Panama City, Florida while employed by Premier. Following receipt of Claimant's claim for death benefits, the Jacksonville District Director's Office advised Premier that a claim had been filed, by letters of April 16, 2003 and June 4, 2003. (CX 2, 3). Claims Examiner Shelly Glasgow filed a controversion dated October 10, 2003, on behalf of Carrier Sedgwick Claims Management Services and Employer "PM Marine/Premier Stevedoring," which controverted Claimant's entitlement to death benefits on the following basis:

> . . . Employee's death did not arise out of or in the course of employment. The employee had clocked out and was off the clock at the time of the accident.

(CX 4).

This case was transmitted by the district director to the Office of Administrative Law Judges for a hearing on November 7, 2003. On January 23, 2004, the undersigned administrative law judge issued a Notice of Assignment, Notice of Hearing and Order, scheduling the hearing for June 15, 2004 in St. Augustine.

By counsel's facsimile communication of June 7, 2004, Employer, on behalf of both parties, filed a motion to cancel the June 15, 2004 hearing in this matter and proceed on a written

[2] Claimant submitted W-2s reflecting $25,470.20 in earnings for the 50 weeks prior to Mr. Gibbs' death in 2002, which amounts to $509.40 weekly (CX 11). Adding $509.40 for the remaining two weeks of the year amounts to projected annual earnings of $26,489.00.

record. Specifically, "the parties mutually agree[d] that a hearing in this matter would be unnecessary as the facts are not in dispute and that the compensability of the claimant's accident is purely a question of law." The parties asked that they be permitted to serve simultaneous Motions for Summary Decision with this tribunal no later than Monday, August 2, 2004.

The undersigned's Order Canceling Hearing and Scheduling Proceedings (reissued on July 13, 2004) canceled the hearing and gave the parties until August 2, 2004 to file cross motions for summary decision. By Order of August 4, 2004, that period was extended to September 1, 2004, subject to an additional 30 day extension by stipulation of the parties. The Brief on Behalf of Claimant was filed on September 1, 2004, along with exhibits CX 1 through 11, and by agreement, the Employer/Carrier's Trial Brief was filed on September 16, 2004, along with exhibits EX 1 through 3.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS

The accident giving rise to this action occurred on the evening of Wednesday, December 18, 2002 in Panama City, Florida, when Mr. Gibbs' vehicle went off the edge of a dock, resulting in his death. (CX 7; EX 1). Mr. Gibbs, who resided in Pensacola, Florida, had traveled approximately one hundred miles to the site of the Smurfit-Stone Paper Mill in Panama City, Florida to work for Employer, Premier Stevedoring, loading paper products from the Smurfit-Stone warehouse onto a vessel. (CX 7, EX 1 at 5, 14-15.) Premier is a company that operates out of Mobile, Pensacola and Panama City, with its main terminal in Mobile. (EX 1 at 5). Mr. Gibbs had worked for Premier previously for a period of years, and had worked at least ten times at the Smurfit-Stone location. (EX 1 at 13, 25-26). Although he had worked for other employers that year, Premier was his employer at the time of the accident.[4] (CX 5 at 15; EX 1 at 13, 37-38). Consistent with its usual practice, Premier was working for a shipping line and did not have a contractual relationship with Smurfit-Stone. (EX 1 at 7). During this particular assignment, Mr. Gibbs worked as a crane operator. (EX 1 at 13). He had been selected by Donat Beland, in Mr. Beland's capacity as ship supervisor for Premier.[5] (EX 1 at 5). According to Mr. Beland, approximately 17 or 18 workers, some of whom were local, were assigned to work on the loading project.[6] (EX 1 at 11, 21-22). As Premier is a nonunion shop, there was no hiring center and Premier would employ longshoremen directly. (EX 1 at 11-12).

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[3] Claimant's Exhibits consist of the following: Claimant's marriage certificate (CX 1); a 2/28/03 LS-262 (CX 2); 4/16/03 and 6/4/03 letters from OWCP (CX 3); a 10/10/03 LS-207 (CX 4); Claimant's 5/21/04 deposition transcript (CX 5); Mr. Beland's 5/21/04 deposition transcript (CX 6); 1/23/03 Florida Highway Patrol report with photocopies of photos (CX 7); Mr. Gibbs' 12/18/02 death certificate (CX 8); 12/26/02 cemetery bill (CX 9); 12/20/02 Benboe Funeral Home contract and bill (CX 10); and Mr. Gibb's 2002 W-2 forms (CX 11). Employer's exhibits are Mr. Beland's 5/21/04 deposition transcript (EX 1); 1/23/03 Florida Highway Patrol report (EX 2); and the Decision and Order of Judge Stuart Levin in *Sheri Hart v. Tidewater Staffing, Inc.,* 2003-LHC-1403 (ALJ Jan. 20, 2004).

[4] In 2002, Mr. Gibbs received W-2s from Pinnacle Management Services, Mobile, AL (two); Tri-State Maritime Services, Mobile, AL; Labor Ready Southeast, Inc., Tacoma, WA; AMS, Dallas, TX; SSA Gulf Terminals, Inc., Seattle, WA; and Global Stevedoring, Jacksonville, FL. (CX 11).

[5] Mr. Beland was also manager of sales and marketing for Premier. (EX 1 at 5).

[6] Mr. Beland initially estimated 12 to 16 workers. (EX 1 at 11).

Mr. Gibbs and the other out-of-town employees were compensated on an hourly basis (approximately $15 to $17 hourly for forklift and crane operators) and they were paid an additional two hours of pay each way for their travel to and from Panama City, Florida, mainly to pay for their gas, according to Mr. Beland. (EX 1 at 15-17, 28.) The eight to ten out-of-town employees were also provided with accommodations at one of the nearest hotels (a Howard Johnson's that was eight miles from the paper mill), and they were paid for two or three meals daily, at a rate of $10 per meal. (EX 1 at 17-18, 33.) Usually two employees shared a hotel room. (EX 1 at 34-35.) They were not paid for their travel time to and from the hotel. (EX 1 at 36). The usual work shift was from 7:00 a.m. to 8:00 p.m., with a meal break from 1:00 to 2:00 p.m. (EX 1 at 19). There were no time clocks or punch cards but the starting and ending times were recorded on a time sheet. (EX 1 at 27-28).

The loading operations were performed in an isolated location west of the Smurfit Stone plant, on one long (approximately 800-foot), continuous pier adjacent to one or two warehouses. (EX 1 at 8). The entire site is private property owned by Smurfit Stone. (EX 1 at 6-7, 36-37). All of the equipment was furnished by Premier and was transported by truck from Mobile and back. (EX 1 at 29-30). During the period of time that the loading was conducted, the equipment was stored outside, at the east end of the warehouse. (EX 1 at 30-31). The paper products were brought from the mill to the warehouse by rail, and the Premier forklift operators took the products from the warehouse by forklifts, and crane operators then loaded them onto the vessel. (EX 1 at 8-9). General laborers would hook the cargo up on the pier and they would unhook it in the hull of the ship. (EX 1 at 15). The laborers were also responsible for cleaning up after the loading operations, and all of the Premier employees were expected to pick up after themselves. (EX 1 at 31-32).

The Premier employees parked at the stern of the vessel, on the dock side, approximately 100 to 200 feet from the work area, and between 100 and 150 feet from the stern of the vessel. (EX 1 at 23, 26). They tried to park as close to the work site as possible without obstructing the machines and equipment in use. (EX1 at 23-24). The parking area belonged to Smurfit-Stone and, according to Mr. Beland, Premier did not exercise any control over it. (EX 1 at 37).

The day of the accident, a Wednesday, was the first or second day that Premier had performed cargo operations in Panama City on the Smurfit-Stone waterfront. (EX 1 at 6-7, 10-11, 13-14). Earlier that day, Mr. Gibbs had spoken to his wife and told her that they would be working both Wednesday and Thursday and that they had been put up in a hotel. (CX 5 at 15). At the end of the work day, Mr. Beland, who was standing on the pier talking to a police officer, observed Mr. Gibbs leave the vessel via the gangway and told him that he would see him in the morning and to be careful. (EX 1 at 24, 25, 26.) According to Mr. Beland, less than five minutes later, one of the longshoremen, Joey Roddy, who was approximately 600 feet away, started screaming (EX 1 at 24-25, 33). At that point, Mr. Beland walked over and discovered what had happened. (EX 1 at 24-25). He estimated that Mr. Gibbs' vehicle had entered the water approximately 600 to 700 feet from where it had been parked. (EX 1 at 26).

Mr. Roddy was the last person to see Mr. Gibbs alive. (CX 7 at 12-13; CX 5 at 14.) He provided the following handwritten statement, which was appended to the police report as a Witness Interview:

> I and Thomas just got off work and was talking about our cranes we were operating and our motel rooms. I said see you later and he said bye. He got in his car and took off. I got in my car – turn around on the dock and as I turned I seen his car going over the dock. Drove there and looked because it did not seem real. Went to the water and seen it was a car and immediately started yelling for help and Donat Beland, some other people and the cop stationed on the dock came running.

(CX 7 at 22).

The accident was investigated by Corporal B.E. Jensen, a traffic homicide investigator with the Florida Highway Patrol. (CX 7). The investigator determined that the crash, which involved a 1990 Pontiac owned and operated by Mr. Gibbs, had occurred at 8:05 p.m. on December 18, 2002 on private property at the Smurfit-Stone docks.[7] (CX 7 at 4, 6, 9). Mr. Gibbs' vehicle was traveling eastbound beside a seawall, but the vehicle went straight when the seawall veered to the left. (CX 7 at 6). The vehicle traveled over a raised concrete curb at the edge of the seawall, became airborne, flipped over (pointed in the opposite direction), landed on its roof on top of some rocks, slid into the water upside down, sank, and became submerged in water that was approximately nine or ten feet deep. (CX 7 at 6, 11). Mr. Roddy climbed down the rocks but had to abandon rescue efforts for safety reasons. (CX 7 at 13). Mr. Gibbs was not removed from the vehicle until thirty minutes later, when he was still seatbelted on the driver's side of the vehicle. (CX 7 at 6). He was pronounced dead at the scene. *Id.* The medical examiner determined that the cause of death was drowning. (CX 7 at 17).

The investigator determined that the vehicle had not been traveling at an excessive rate of speed; although it was nighttime, there were numerous sources of artificial light; there was no evidence of mechanical malfunction; weather was not a factor; and the roadway was in good repair. (CX 7 at 15, 16). He concluded that Mr. Gibbs was responsible for the crash and his own death. (CX 7 at 17). He noted that the roadway was an unlaned private concrete roadway, the purpose for which was to allow workers access to the ships and warehouse, and that access to the roadway and surrounding property was restricted by fences and guarded gates. (CX 7 at 9, 10). The investigator estimated that Mr. Gibbs had talked to Mr. Roddy for approximately two minutes before getting into his vehicle and that Mr. Gibbs then traveled approximately 365 feet before going over a 42-inch wide, 5-inch high raised walkway which ran alongside the roadway. (CX 7 at 9, 11). Beyond the walkway was an area of Panama City Bay with several large ships secured to the seawall. (CX 7 at 9). A diagram appended to the report showed that the vehicle had traveled on a straight line (veering slightly to the left) over the dock onto some rocks next to the water (at a point on the south side of the road, across from the Smurfit-Stone warehouse on the north side), while the private road (which was initially straight for an estimated two tenths of a mile) had sharply veered to the left and narrowed (from approximately 50 feet to approximately 14 feet), before expanding and continuing eastward in the area beyond the

[7] The Final Investigation report stated that the nearest intersection was "East Avenue, which is located .1 mile north of the Area of Collision," while the Florida Traffic Crash report indicated that the accident site was three tenths of a mile south of East Avenue (CX 7 at 4, 9).

warehouse. (CX 7 at 7, 9, 11). According to the diagram, the vehicle went over the seawall at the midpoint of the portion of the roadway which sharply veered to the left. (CX 7 at 7).

At the time of his death, Mr. Gibbs was married to Claimant, and they had been married since 1983. (CX 1, CX 5 at 12-13) They did not have any children and Claimant was his only dependent. (CX 5 at 6, 8, 13). Claimant documented funeral and burial expenses, consisting of $1,325.00 from the Holy Cross Catholic Cemetery (CX 9) and $3,732.10 from the Benboe Funeral Home (CX 10). She also submitted Wage and Tax Statements for 2002, documenting earnings of $25,470.20 for the year for employers other than Premier. (CX 11). Claimant testified that to the best of her knowledge, Mr. Gibbs was in good health at the time of the accident. (CX 5 at 18).

DISCUSSION

For Mr. Gibbs' death to be compensable under the Longshore and Harbor Workers' Compensation Act, it must have arisen out of and in the course and scope of his employment. 33 U.S.C. §902(2). It is well established that for an injury to satisfy these criteria, it must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *Trimble v. Army and Air Force Exchange Service,* 32 BRBS 239, 1998 WL 783930 (1998). *See also Durrah v. Washington Metropolitan Area Transit Authority,* 760 F.2d 322, 17 BRBS 95 (D.C. Cir. 1985); *Mulvaney v. Bethlehem Steel Corporation,* 14 BRBS 593, 595 (1981). An injury occurring during off-duty hours may be covered so long as the claimant is on the work premises for work-related reasons. *Wilson v. WMATA,* 16 BRBS 73 (1984). However, the link to employment is severed if the injury is incurred while the employee is acting for personal reasons or has embarked on a personal mission. *Alston v. Safeway Stores, Inc.,* 19 BRBS 86, 1986 WL 66417 (1986).[8] Injuries received by employees traveling between their homes and their regular places of work are **not** compensable, unless recognized exceptions to this rule (known as the "coming and going" rule) are applicable. *See, e.g., Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469 (1947). Such injuries are said not to have arisen "out of the ordinary hazards of the journey, hazards which are faced by all travelers and which are unrelated to the employer's business." *Id.* at 479. However, in *Trimble, supra*, the Board stated that "[a]n employee is allowed a reasonable time before and after work to enter and exit employer's premises; injuries occurring on the premises during this time arise within the scope of employment, and the 'coming and going' rule does not apply."

Under section 20(a), 33 U.S.C. § 920(a), it is presumed, in the absence of substantial evidence to the contrary, that a claim comes within the provisions of the Act. However, the presumption does not assist a claimant in establishing a prima facie case, which must be established before invoking the presumption. *Devine v. Atlantic Container Line, G.T.E.,* 23 BRBS 280 (1990). "[A] prima facie 'claim for compensation' ... must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal*

[8] A minor deviation is insufficient to sever the connection. *See Boyd v. Ceres Terminal,* 30 BRBS 218 (1997 (forklift operator providing assistance to motorist while on way from locker room to forklift entitled to coverage). *But cf. Compton v. Avondale Industries, Inc.,* 33 BRBS 174 (1999) (smoking marijuana during work day not covered.)

Sheet Metal, Inc. v. Director, OWCP (Riley), 455 U.S. 608, 615, 14 BRBS 631, 633 (1982).[9] After the prima facie case is established, a presumption arises under section 20(a) that the employee's injury or death arose out of his or her employment. *Willis v. Titan Contractors, Inc.,* 20 BRBS 11 (1987). If the employer presents substantial rebuttal evidence, sufficient to sever the connection between the claimant's harm and his or her employment, the presumption no longer controls and the issue of causation must be resolved on the complete record (*see Holmes v. Universal Maritime Services Corp.,* 29 BRBS 18 (1995)), with the claimant bearing the burden of proof (*see Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (1994)). Moreover, the section 20(a) presumption does not apply to the legal interpretation of the Act's coverage provisions. *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 21 (2002); *Arjona v. Interport Maintenance Co., Inc.,* 34 BRBS 515 (2000).

Coverage under the Act requires that a claimant satisfy both the status requirement of section 3(a) and the situs requirement of section 2(3). *See* 33 U.S.C. §§ 903(a), 902(3); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 264-65, 6 BRBS 150, 159 (1977). The status requirement under section 2(3) of the Act provides (with certain exclusions) that the Act applies to persons engaged in maritime employment, including longshore workers (or other persons engaged in loading and unloading operations) and harbor workers (including ship repairmen, shipbuilders, and shipbreakers). *See also* 20 C.F.R. § 701.301(a)(12). *See generally Atlantic Container Services, Inc. v. Coleman,* 904 F.2d 611, 23 BRBS 101 (11th Cir. 1990). The situs requirement, under section 3(a), provides that compensation is payable only if the disability or death results from an injury "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal building way, marine railway, or other adjoining area used customarily by an employer in loading, unloading, repairing, dismantling, or building a vessel)." *See generally Bianco v. Georgia Pacific Corp.,* 304 F.3d 1053 (11th Cir. 2002).

Here, it is undisputed that Mr. Gibbs worked as a longshoreman for Premier, operating a crane to load a vessel, and the accident site was the docks of the Smurfit-Stone warehouse from which paper products were being loaded onto the vessel. Thus, his employment satisfied both the situs and status requirements during the period of time that he was so employed. The issue, however, is whether Mr. Gibbs was acting within the scope of his employment at the time of the accident leading to his death, inasmuch as his work day had ended within five minutes before the accident and he was injured driving his personal automobile away from the work site (although he had not yet exited the dock area and was **not** traveling to his home).

Relying upon *O'Leary v. Brown-Pacific Maxon,* 340 U.S. 504, 507 (1951) (a Defense Base Act case)[10] and *Bountiful Brick Co. v. Giles,* 276 U.S. 154 (1928) (a case involving the

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[9] The Supreme Court explained: "Arising 'out of' *and* 'in the course of' employment are separate elements: the former refers to injury causation; the latter refers to the time, place and circumstances of the injury. Not only must the injury have been caused by the employment, it also must have arisen during the employment." *Federal Sheet Metal,* 455 U.S. at 615.

[10] Cases brought under the Defense Base Act (42 U.S.C. §1651 *et seq.*) are subject to a special rule, known as the "zone of special danger" rule, which addresses the issue of a claimant being exposed to certain risks overseas that he or she would not have otherwise encountered. In *O'Leary*, when an employee drowned while attempting a rescue in a recreational area for employees in Guam, the Supreme Court found that the Act applied and stated: "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the

interpretation of Utah worker's compensation law),[11] Claimant argues that Mr. Gibbs' actions may be deemed to have been taken within the course and scope of his employment, because Mr. Gibbs was allowed a reasonable time after cessation of his duties to enter and exit the workplace. (Claimant's Brief at 8 to 9). Claimant further argues that she is entitled to the presumption under section 20(a) of the Act that Mr. Gibbs' injury was work related based upon the undisputed facts and that Employer has not rebutted the presumption. (Claimant's Brief at 9 to 11).

On the other hand, Employer disagrees and argues that because the premises on which the accident occurred were neither owned nor controlled by Employer and Mr. Gibbs was not reimbursed for his trip to the hotel, this claim is barred by the "coming and going" rule. (Employer's Brief at 5 to 10). The coming and going rule and its exceptions have been applied to Longshore cases, most of which involve nonappropriated fund instrumentalities located on military bases, that involve scenarios bearing a superficial resemblance to some of factual circumstances in the instant case.[12] For example, in *Hart v. Tidewater Staffing, Inc.,* Case No. 2003-LHC-01403 (ALJ, Jan. 30, 2004) (submitted as EX 3), Administrative Law Judge Stuart Levin held that a claimant Sherri Hart, an employee of Tidewater Staffing assigned to work at a company (Earl Industries) located on the Mayport Naval Base was not injured in the course of her employment, when she was injured while bicycling to work, after passing through the security gate of the naval base but one mile from the actual job site. In *Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch,* 23 BRBS 175 (1990), relied upon by Judge Levin, the Benefits Review Board found that a claimant who had driven to work and parked her car at a parking lot on the air force base where she was employed, and was injured in a fall on her way to the work site, was not injured in the course and scope of her employment. Similarly, in *Cantrell v. Base Restaurant Wright-Patterson Air Force Base,* 22 BRBS 372 (1989), also relied upon by Judge Levin, a claimant on her way to work who fell while on base property, but a half block from the employer's premises, was found to be outside of the scope of employment. However, each of these cases is distinguishable, *inter alia*, because each claimant was on route between her home and work while the instant case involves a worker on travel status who was most likely on route from work to his hotel.[13] Moreover, by definition

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injury arose." However, in *Gillespie v. G.E. Co.*, 21 BRBS 56 (1988) a*ff'd mem*. 873 F.2d 1433 (1st Cir. 1989), the Benefits Review Board found that, where no evidence showed that the activity causing death (asphyxiation during autoerotic activity) was related to conditions created by the overseas job, the "zone of special danger" test was not met.

[11] The Benefits Review Board found *Bountiful Brick*, which was based upon Utah worker's compensation law, to be inapplicable to Longshore cases (because a body of law had evolved in the Longshore area) in *Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch*, 23 BRBS 175, 1990 WL 284050 (1990), discussed below. However, in other cases (*e.g., Trimble*), the Board has applied a rule similar to that enunciated in *Bountiful Brick.*

[12] Administrative Law Judge David W. DiNardi provided an extensive discussion of this line of cases in his decision in *Saunders v. Navy Exchange,* Case No. 2000-LHC-00244 (ALJ, June 15, 2000). In *Saunders,* Judge DiNardi found the coming and going rule inapplicable because the claimant was on her employer's premises when she collided with a forklift on the way from the parking lot (where her employer had directed her to park) to the entrance to the Navy Exchange building.

[13] It is unclear whether Mr. Gibbs was on his way to the hotel or whether he planned to stop somewhere else first; however, both his wife and his supervisor thought he was most likely on his way to the hotel, as that was his usual practice, although Mr. Beland stated it was possible he was going to get something to eat. (CX 5 at 14-15; EX 1 at 35). It is undisputed that Mr. Gibbs was not planning to return to his home that evening and there is no evidence whatsoever of a "personal frolic." Thus, under section 20(a), it may be assumed that he was covered.

the coming and going rule applies to injuries sustained by "employees traveling between their homes and their regular places of work." *See, e.g., Cardillo,* 330 U.S. at 479.

The crux of this case is the fact that Mr. Gibbs was on travel status at the time of the accident. Workers' compensation cases in various jurisdictions have distinguished cases involving traveling employees from those involving stationery employees and have found the former category of employees to be covered for injuries sustained when they are traveling on an employer's business (and are not en route from their homes), provided that they are not engaged in a personal frolic. *See Larson's Workers' Compensation Law* §25.01 *et seq.* (Traveling Employees) (2000); *Modern Workers Compensation* §111.15 (Commercial Travelers) [Westlaw MCW §111:15]. Thus, in *Toal Associates v. Workers' Compensation Appeals Board (Sternick),* 814 A.2d 837 (Pa. Cmwlth. 2003), Pennsylvania worker's compensation death benefits were provided when an employee died in a motel after he had completed work for an employer in a location away from the main office. *See also Mulready v. University Research Corp.,* 360 Md. 51, 756 A.2d 575 (1999) (slipping in bathtub covered under Maryland program); *Capizzi v. Southern District Reporters, Inc.,* 471 NYS2d 554, 459 NE2d 847 (NY Ct. App. 1984) (slipping in shower covered under New York program). However, a traveling employee who was injured while visiting bars and playing pool on his day off was found not covered by the Michigan workers' compensation program. *Eversman v. Concrete Cutting & Breaking,* 463 Mich 86, 614 N.W.2d 862 (2000). While these cases depend on the workers' compensation laws of various jurisdictions, they are not inconsistent with cases decided under the Longshore program.

In *Hurley v. Lowe,* 168 F.2d 553 (DC Cir. 1948), *cert den.* 334 U.S. 848 (1948) (a D. C. worker's compensation case decided under the Longshore Act), the U.S. Court of Appeals for the District of Columbia addressed the situation where a D.C. attorney on a business trip was injured during the course of a dinner with his father and mother at a restaurant in Boston. He fell while escorting his father, an elderly man, down a short flight of steps in the direction of the restroom. The D.C. Circuit stated:

> . . . **The 'course of employment' on a specified errand, ordered by an employer, to a place different from the regular place of employment, includes all the ordinary incidents of the errand which the employer would normally contemplate as occurring in the course of it.** Thus, when the employing firm sent this lawyer, otherwise engaged in practice in the District of Columbia, on a business trip for specific purposes, **all the natural incidents of that trip which would be contemplated by the employer, such as the eating of meals in ordinary places at ordinary times, were in the course of that employment.** This is not only the normal concept established in the business world, but fits the intent of the law as to coverage against injury. [Emphasis added.]

Hurley at 555. However, the D.C. Circuit did not disturb the deputy commissioner's finding that the dinner was "of a social character" and therefore not within the scope of employment because that view was not "'forbidden by law' or without any reasonable legal basis." *Id.* at 556. The instant case, in contrast, did not involve any social or personal outings, and the decedent's trip to his hotel or a restaurant was a natural and ordinary incident to his work-related travel.

In more recent D.C. workers' compensation opinions, a "zone of special danger" test, similar to the one applied in Defense Base Act cases (relating to employees being exposed to certain risks overseas that they would not have otherwise encountered),[14] has been applied to travel situations (*Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of America v. Adler,* 340 F.2d 799 (D.C. Cir. 1964) (employee slipping in shower on business trip covered). The test has also been applied to situations not involving travel. *See, e.g., Durrah, supra* (finding zone of special danger for guard using soda machine); *Director, OWCP v. Brandt Airflex Corp.,* 645 F.2d 1053 (D.C. Cir. 1981) (employee climbing stairs to job site covered). *See also Furlong v. American Security & Trust Co.,* 21 BRBS 155 (1988). However, the zone of special danger test has only been applied to Defense Base Act cases and D.C. worker's compensation cases and not to other Longshore cases. *E.g., Harris, supra.* Thus, the pertinence of these later D.C. cases to the instant case is unclear. Nevertheless, most worker's compensation jurisdictions have adopted the rule that when an employee must encounter special hazards on the only route or the normal route to a place of work, the hazards of that route become the hazards of employment. *See Larson's Workers' Compensation Law* § 13.01 [3]. In the instant case, the configuration of the road along the waterfront (with its attendant risks) could reasonably be considered a special hazard.[15] This issue is discussed further below in connection with the coming and going rule exceptions.

Brown v. Army & Air Force Exchange Service, 151 F.3d 1028 (mem.), 1998 WL 372472 (4th Cir. 1998) involved a woman on business travel who was assaulted by another employee in his room, which was being used as a hospitality suite. Applying the test set forth in *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992), the Fourth Circuit upheld the administrative law judge's dismissal of the action.[16] The Fourth Circuit noted that the assault did not take place on the employer's premises and occurred after the optional, employer-sponsored social gathering, from which the employer did not derive any obvious benefits. In contrast, no social gathering was involved here and there is no evidence that Mr. Gibbs deviated from the purposes for his travel for personal or social reasons. In fact, he was proceeding on a private road running along the dock area where he worked.[17] Under these circumstances, he was acting within the scope of employment.

Besides the fact that Mr. Gibbs was on travel status and was not traveling between his home and work, the coming and going rule is also inapplicable because the accident occurred on the work premises only minutes after the work day had ended. As noted above, an employee is allowed a reasonable period of time before and after work to enter and exit employer's premises. *See Trimble, supra*, *citing Larson's Workers' Compensation Law* § 15.00 (1997). *See also Larson's Workers' Compensation Law* § 13.01 *et seq.* (Premises Rule) (2000); *Alston, supra.* Here, Mr. Gibbs had not left the premises, which were privately owned and separated from the

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[14] See footnote 10 above.

[15] The diagram and photographs attached to the police report illustrate the special hazard involved. (CX 7).

[16] The *Vitola* factors relate to whether an injury during a voluntary social activity arose in the course of the claimant's employment and include: "(1) whether the employer sponsored the event; (2) whether there was some degree of encouragement to attend; (3) whether the employer substantially financed the event; (4) whether employees viewed the event as an employment benefit to which they were entitled; (5) whether the employer obtained any tangible advantages from the event; and (6) whether the activity occurred on the employer's premises." *Brown v. Army & Air Force Exchange Service*, 151 F.3d 1028 (mem.), 1998 WL 372472 (4th Cir. 1998).

[17] The issue of whether the accident site may be considered Employer's premises is discussed below.

public roads by fencing and guarded gates, and he was still in the dock area where the loading and unloading operations were conducted when he drove off the dock. The warehouse was adjacent to the area where Mr. Gibbs' vehicle went off the road and dock, as shown in the diagram and photographs appended to the police report. (CX 7 at 7, 31, 34). I find the fact that the premises upon which the work was performed were not owned by Premier to have no more significance than it would have had if the injury had occurred on the premises while Mr. Gibbs was "on clock," because Premier exercised control over the premises. The instant case is in sharp contrast with the nonappropriated fund instrumentality cases which involved private employers contained within buildings located on a military base, where an employee was injured on property separate from where the work was performed, over which the instrumentality exercised no control. When control was exercised, the property has been deemed to be part of the employer's premises even when there was no ownership. *See, e.g., Shivers v. Navy Exchange,* 144 F.3d 322, 32 BRBS 99 (4th Cir. 1998) (finding sufficient control over parking lot where employee slipped and fell when employer maintained grounds, salted pavement, removed trash, and issued decals); *Sharib v. Navy Exchange Service,* 32 BRBS 281 (1998) (sufficient control when employer's trucks damaged sidewalk and surrounding grass area and created a risk of employment not shared by the public); *Trimble, supra* (finding sufficient control when employee slipped on ice-covered sidewalk adjacent to employee entrance of employer's facility, leading to parking lot, when employer's employees sometimes shovel and salt the pavement and employees are directed to park in the lot and use the entrance). Similarly, the control exercised by Premier in the instant case over the dock area makes the accident site part of its premises.

In *Soboczynski v. Pile Foundation Construction,* Case No. 1995-LHC-0613, 30 BRBS 580, 1996 WL 363337 (ALJ, 1996), Administrative Law Judge Paul Teitler found that the parking area owned by the Navy that was used with the Navy's permission for parking by employees of Pile (an employer constructing a trestle adjacent to a pier under a contract with the Navy), in an area not open to the public, could be considered part of the employer's premises. Judge Teitler noted that there was some control by Pile over access to the area and that "[i]n addition, unlike the parking area in *Harris,* Pile occupied the pier, using it as a staging area and having its site trailer there, in addition to the parking spaces."

For similar reasons, the area in the instant case may be considered part of the Employer's premises. As Mr. Gibbs had not yet left the dock on which the work was performed, he was clearly in an area controlled by Premier. Premier occupied the dock area and exercised control over the work performed on the dock. Premier employees were responsible for keeping the work area free of debris from Premier's operations. The area was not accessible to the public, as it was separated by security gates and fences. Further, while Premier did not direct Mr. Gibbs where to park or what route to take when exiting the dock area, all of the employees parked in one area and necessarily utilized the private roadway adjacent to the dock.

Even assuming, arguendo, that this case may be deemed to be covered by the coming and going rule, it falls within one or more of the recognized exceptions to the rule. In *Broderick v. Electric Boat Corporation,* 35 BRBS 33, 2001 WL 467886 (2001), a case involving an employer-sponsored van pool, the Benefits Review Board, citing *Cardillo*, stated that there are exceptions to the coming and going rule where "the hazard of the journey may fairly be regarded as the hazards of the service" and set forth the following specific exceptions:

> . . . The coming and going rule does not preclude coverage where: (1) the employee is paid for the trip to and from work either through actual payment or the provision of a vehicle (trip payment exception); (2) the employer controls the journey; or (3) the employee is on a special errand for the employer. . . .

Id. See also Trimble, supra.

First, regardless of whether Mr. Gibbs was paid by the mile for his trip to and from the hotel, the trip payment exception is applicable because he was paid for his trip expenses, including his hotel, a flat rate for his meals, and additional money allocated for travel time and intended to cover his gasoline expenses. In *Perkins v. Marine Terminals Corporation,* 673 F.2d 1097 (9th Cir. 1982), an employee had been sent by his union from his home in San Francisco to Oakland to work as a longshoreman and he was injured in an automobile accident on his way home from Oakland. The employer provided bus service and also paid the employees for thirty minutes of travel time, one of the choices available under the union contract. The Ninth Circuit found that payment of one-half hour of travel time to compensate Perkins for his round-trip commute, which was paid as an inducement to get longshoremen to work in Oakland, was sufficient to bring the case within the trip payment exception.

In *Perkins,* the Ninth Circuit noted that there were two forms of trip payment, consisting of payment for travel time and payment for travel expenses. Citing *Larson's Workers' Compensation Law* (1978), the Ninth Circuit noted that (1) the first variation applies when the employee is paid an identifiable amount as compensation for time spent in a going or coming trip, particularly when the work is being performed at a remote place in order to induce men to work at that distance from their home and they are paid for the time consumed by travel and (2) the second variation arises when the employer pays or reimburses the employee for travel expenses, although the travel-expenses variation has usually been upheld only where the payment has been clearly designated as travel reimbursement (as opposed to an added form of compensation) and is substantial. The Ninth Circuit noted that the fact that the payment for travel is offered as an inducement for the employee to accept the job is significant under either variation.

Both forms of trip payment were involved in the instant case and both were paid as an inducement for Mr. Gibbs and the other out-of-town workers to work in Panama City. The fact that Mr. Gibbs was not reimbursed for mileage to the hotel would only be relevant to the first variation. With respect to the second variation, it is clear that Mr. Gibbs was provided travel reimbursement in the form of a hotel payment and meal allowance. Accordingly, this case falls within the trip payment exception, if the coming and going rule is applied.

Second, with respect to the control of the journey exception, it is clear that Premier exercised some control over Mr. Gibbs' final trip. As noted above, the accident occurred on the road running along the dock area where Mr. Gibbs worked and the purpose for the road was to allow the longshoremen access to the ships. Further, as explained above, Premier exercised some control over the dock area where the work was performed. In addition, Premier selected the hotel that was Mr. Gibbs' apparent destination.

Third, Premier's assignment of Mr. Gibbs to work at the Panama City site may also be deemed to be a special errand under the analysis in *Hurley, supra,* because he was assigned by Premier to work at a location away from his home and the natural incidents of that trip would include the operation of his private vehicle on a trip from the dock area to his hotel or a restaurant. It necessarily follows that his trip would be covered under the special errand exception to the coming and going rule.

For the reasons set forth above, I find that Mr. Gibbs was acting within the course and scope of his employment with Premier at the time of the fatal accident leading to his death.

CONCLUSION

In view of my finding that Mr. Gibbs was acting within the course and scope of his employment with Premier at the time of the fatal accident leading to his death, Claimant is entitled to death benefits, including death compensation and funeral expenses, under section 9 of the Act. 33 U.S.C. §909. That section provides, in pertinent part, that if a work-related injury causes death, a death benefit is payable as follows:

> (a) Reasonable funeral expenses not exceeding $3,000,
>
> (b) If there be a widow or widower and no child of the deceased to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage. . .

Id. Subsection (e) provides that, "[i]n computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage." *Id.* at §909(e).[18] Thus, death benefits are payable to Claimant in the amount of 50 percent of the decedent's average weekly wage of $509.40 ($254.70) until her death or remarriage. *Id.* at §909(b). Upon remarriage, she will receive a two-year lump sum of benefits. Claimant has documented funeral expenses in the amount of $5,057.10 and entitlement to the maximum payable amount of $3,000.00. *Id.* at §909(a).

In her brief, Claimant argues that she is entitled to the 10 % penalty set forth in section 14 of the Act, 33 U.S.C. §914, based upon Employer's failure to timely controvert the claim. *See also* 20 C.F.R. §§702.232, 702.233. This issue was first raised in Claimant's brief as part of her motion for summary disposition. Employer has not addressed the issue but has not denied Claimant's assertions. Based upon the untimely controversion, Claimant is entitled to the section 14 penalty, unless nonpayment is excused by the district director upon a showing by the Employer that "owing to conditions over which [the Employer] had no control such installment could not be paid." 20 C.F.R. §702.233. The penalty would cover unpaid installments of benefits relating to the period from 14 days after notice of Mr. Gibbs' death (January 1, 2003) until the controversion was filed (October 10, 2003). 20 C.F.R. §702.232, 702.233 *See*

[18] The National Average Weekly Wage (NAWW) at the time of Mr. Gibbs' December 18, 2002 death was $498.27, as reported on the Employment Standards Administration web site. (See www.dol.gov/esa.)

generally James J. Flanagan Stevedores, Inc., v. Gallagher, 219 F.3d 426, 34 BRBS 35 (5th Cir. 2000).

Accrued benefits are payable as a lump sum and interest is payable as a matter of course on such benefits (but not on the amount of the penalty), based upon the rate specified in 28 U.S.C. §1961. *See Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987); *Grant v. Portland Stevedoring Co.,* 16 BRBS 267 (1984).

The above calculations are subject to verification and adjustment by the district director or other appropriate action. *See* 20 C.F.R. §§ 702.301, 702.311.

Finally, Claimant has established entitlement to attorney's fees. 33 U.S.C. §928; 20 C.F.R. §702.132. Claimant's attorney shall have 30 days to submit a fee petition relating to work performed before the Office of Administrative Law Judges, comporting with the requirements of the Act and regulations, following which Employer/Carrier shall have 30 days to submit objections. The fee petition will be the subject of a supplemental decision and order.

ORDER

IT IS HEREBY ORDERED that:

(1) the Claimant's claim for death benefits is **GRANTED,** as set forth above;

(2) Employer Premier Stevedoring, Inc. and Carrier Sedgwick Claims Management Services, Inc. shall pay death benefits to Claimant Yvonne Gibbs at a rate of $250.40 weekly (based upon 50 percent of the decedent's average weekly wage of $509.40) from December 19, 2002 and continuing until her death or remarriage, including all applicable cost of living increases, together with penalties and interest on unpaid accrued benefits, as set forth above;

(3) Employer Premier Stevedoring, Inc. and Carrier Sedgwick Claims Management Services, Inc. shall pay Claimant Yvonne Gibbs the amount of $3,000.00 as reimbursement for funeral expenses; and

(4) Claimant's attorney shall file, and serve upon opposing counsel, a fully documented and itemized application for attorney's fees within thirty (30) days after this Decision and Order is served upon the parties by the District Director, and Employer/Carrier shall file any objections within thirty (30) days of service of the fee petition.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.